

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

SA.No. 783 of 1998(B)

AS.145/1993 of II ADDL. DISTRICT COURT, KOLLAM
OS.184/1991 of MUN-MAGI COURT, SASTHAMCOTTA
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APPELLANTS/APPELLANTS/DEFENDANTS:

1.N.RAVEENDRAN PILLAI, RESIDING AT THARAYIL
VADAKKATHIL VEEDU, ERAVICHIRA KIZHAKKEMURI,
SOORANAD, SOUTH VILLAGE.

2.KAMAKSHI AMMA, RESIDING DO. DO.

3.KAMAKSHI JAYASREE, RESIDING IN DO.

4.KAMAKSHI AMMA AJITHA,
RESIDING AT DO. DO.

BY ADV. SRI.K.SUBASH CHANDRA BOSE
SRI.V.PREMCHAND

RESPONDENT/RESPONDENT/PLAINTIFF:

KHADER RAWTHER IBRAHIM RAWTHER,
RESIDING AT NISHA MANZIL, IINCHAKATTU
VILA KIZHAKKATHIL, THRIKKUNNAPUZHA VADAKKEMURI,
SOORANADU SOUTH VILLAGE.

BY ADV. SRI.N.UNNIKRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/12/2006, THE COURT ON
15/12/2006 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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S.A.No. 783 of 1998-B

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Dated this the 15th day of December, 2006.

JUDGMENT

The defendants in a suit for declaration of easementary right in respect of usage of water for irrigation of A schedule from C schedule pond situated in B schedule property belonging to the defendants and for consequential injunction against reclamation of C schedule pond and obstruction to free flow of water to the A schedule, challenges concurrent decree granted by the courts below.

2. Admittedly, plaint C schedule is a pond in B schedule property. Defendants pleaded that water from the said pond was not being used for irrigating A schedule paddy field. According to them, there is a canal being maintained by the Panchayat. The trial court on the basis of Exts.C1 and C2 Commissioner's reports and after hearing the evidence of P.Ws.4, 6 and 7, who are nearby residents, as also P.W.5 Village

Officer, who made Ext.A2 report to the Revenue Divisional Officer in connection with a proceedings under Cr.P.C. in relation to the pond in question, came to the conclusion that C schedule pond was in existence and that it was filled up after the visit of the Commissioner that led to the filing of Ext.C1 report. The trial court overruled the defence contention that the plaintiff having purchased A schedule property only in 1974 is not entitled to claim the easement. Appreciating the evidence, the trial court found no reason to eschew the Commissioner's report and the version of the neighbours.

3. The lower appellate court concurred with the findings of the trial court after appreciating the entire materials on record. It found that the oral and documentary evidence on record supported the findings of the trial court and that there was no reason warranting interference.

4. Before the lower appellate court, a contention was raised that what is pleaded by the defendants is,

at the most, something that would not amount to easement by prescription by reason of the exception carved out in Clause (c) of Section 17 of the Easements Act, 1882. That plea was repelled by the lower appellate court holding that the material on record would show that even after B and A schedule properties were separated by a road, a culvert was provided to enable flow of water from B schedule to A schedule, thereby ensuring the availability of water from C schedule pond for the purpose of irrigation of plaint A schedule.

5. Faced with the aforesaid situation, the learned counsel for the appellants-defendants urged that though the decree is concurrent, it ought to have been held that there was no sufficient pleading to uphold any plea of easement. He referred to the decision of this Court in Ibrahimkutty v. Abdul Rahumankunju [1992 (2) KLT 775] to urge that the qualitative and quantitative requirement for the different kinds of easements would require specific pleading regarding the materials. The plaintiff has

pleaded that not only he, but the other people in the locality have also been openly using the water from the pond from time immemorial. The report of the Village Officer and the other evidence on record are categoric to the fact that the water flowing from the C schedule through the B schedule, even through the culvert, across the road between A and B schedule properties, is applied for irrigating A schedule and other paddy fields. So much so, in the second appeal, the plea of want of pleadings does not inspire.

6. In **Tharur Panchayat v. Kunchayi & another (1977 KLT 742)**, this Court held that the right to receive the discharge of water from the lands of others can be established like any other easement, either by express grant or by prescription which presumes a grant.

Having regard to the aforesaid, the findings of the courts below are based on reasonable and logical appreciation of the evidence on record and cannot be treated as perverse. I also do not find that the said

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findings are invalid on any count of law. Under such circumstances, the impugned decree is not vitiated on a substantial question of law. The second appeal fails. Dismissed. No costs.

**THOTTATHIL B. RADHAKRISHNAN,
JUDGE.**

Sha/-

THOTTATHIL B. RADHAKRISHNAN, J.

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S.A.No.783 of 1998-B

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JUDGMENT

Dated: 15th December, 2006.